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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-992

TURNER BROADCASTING SYSTEM, INC., et al.,

Movants-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

REPLY OF APPELLANTS TO OPPOSITIONS TO MOTION TO EXPEDITE

The Government's principal response to the motion to expedite is to stress the "detail and complexity of the evidence presented to" the district court and the Government's asserted need, as a result, "to review the record comprehensively and compare the record with the conclusions reached by the majority and by the dissenting judge." Gov't Opp. 2; see also Broadcasters Opp. 3-4. The motion to expedite, however, does not request any shortening of the normal length of time for appellees' briefing of the case on the merits. It asks that the Court expeditiously make the determination to note probable jurisdiction under the direct appeal statute, because that determination should be straightforward. Moreover, even if

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appellees are given the full time allowed by the rules to respond to both the jurisdictional statement and appellants' briefs on the merits, appellants stand ready to shorten their own time for briefing so that the case may be decided this Term. See Motion to Expedite at 6 n.3.

Indeed, the Solicitor General's emphasis on the need to search the supposedly complex record for support for Judge Sporkin's opinion powerfully confirms that plenary review is required here. A summary affirmance cannot be appropriate where the "majority" opinion cannot stand on its own analysis, but (according to the Government's own response) would require major efforts at reconstruction based on uncited material in order to be defended. In addition, of course, Judge Sporkin's opinion is not in truth a "majority" opinion at all, because Judge Jackson said that he did not agree that the Government was entitled to the judgment it received. In these circumstances, Judge Sporkin's opinion plainly warrants full consideration by this Court -- with briefing and argument on the normal schedule for cases accepted for review in January.

This process should take place this Term, given the continuing impact of the law on appellants' free-speech interests. Quite simply, many more programmers seek access to cable systems than is allowed by the capacity of those systems, currently or in the foreseeable future. See Motion at 8 n.6. And although the Government (Opp. 3) and the broadcasters (Opp. 2, 8-9) choose to focus solely on the (significant) numbers of

programmers displaced by mandatory additions of broadcast stations in 1992/1993, the effects of the must-carry law are of course continuing: they freeze in place all stations being carried in 1992/1993 and thus foreclose that space perpetually to other programmers, regardless of changing editorial preferences of the operators.

Finally, the spectre of massive complexity summoned by the Government and the broadcasters to make the case look dauntingly difficult is ultimately an illusion. Nothing about the size of the record in the case makes consideration this Term, under a normal schedule, inappropriate or unduly burdensome. Indeed, as the jurisdictional statement describes, the opinions below make clear that the central disagreement among the judges concerns the legal significance of certain facts, not the facts themselves.

Notably, Judge Sporkin thought that an interest in conferring benefits on marginal individual broadcast stations could validly sustain the must-carry law, whereas Judge Williams disagreed, reasoning that the relevant government interest was in protecting the health of the broadcast system as a whole -- an interest that Judge Sporkin effectively (and the Government explicitly) conceded is not threatened. J.S. App. 8a-9a n.11; see J.S. App. 40a, 42a-43a, 48a-49a (Williams, J., dissenting); see also Consumer Fed'n of America Opp. at 1. Similarly, Judge Sporkin's "narrow tailoring" analysis turned entirely on his view of the underlying government interest: the interest in conferring maximum benefits on individual broadcast stations could not be

served as effectively by any means less than the must-carry law's conferral of such benefits. J.S. App. 22a-27a. Judge Sporkin's analysis fails if, as Judge Williams insisted, the government interest is (as it appeared when the case was last in this Court) the preservation of the health of the overall over-the-air system. And while Judge Williams explained that the must-carry law's preference for broadcasters over cable programmers failed to be narrowly tailored to any interest in regulating anticompetitive conduct (J.S. App. 96a-110a), Judge Sporkin nowhere disagreed with that analysis, because he found any discussion on this point unnecessary in light of his application of his "equally effective" test to the posited interest in aiding marginal individual broadcast stations (J.S. App. 23a-26a).

These issues should and readily can be adjudicated through the ordinary process of briefing and argument this Term. Most immediately, this Court can and should grant the motion to expedite so that it may expeditiously determine -- what we believe is a straightforward threshold matter -- to set the case for full consideration under the direct-appeal statute.

Respectfully submitted.

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